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IN THE  
**Supreme Court of the United States**

October Term, 1983

UNITED STATES OF AMERICA,

*Plaintiff,*

*v.*

STATE OF MAINE, *et al.*  
(RHODE ISLAND, NEW YORK),

*Defendants.*

**ANSWER AND REPLY BRIEF OF THE STATE  
OF NEW YORK TO EXCEPTION OF  
THE UNITED STATES**

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No. 35 Original

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UNITED STATES OF AMERICA,

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STATE OF MAINE, *et al.* (RHODE ISLAND, NEW YORK),  
*Defendants.*

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**ANSWER OF THE STATE OF NEW YORK TO  
EXCEPTION OF THE UNITED STATES**

The State of New York denies the exception of the United States to the conclusion of the Special Master that Long Island can be treated as part of the mainland. New York further denies that the baseline urged by the United States is the proper closing line.

Respectfully submitted,

ROBERT ABRAMS  
Attorney General

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**REPLY BRIEF FOR THE STATE OF NEW YORK**

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**Statement**

This brief is submitted in response to the brief of the United States in support of its exception. The factual background and the issues involved are set forth in the introduction to the Report of the Special Master and in New York's brief in support of its exceptions.

A determination of the issues depends upon the proper application of Article 7 of the Convention on the Territorial Seas and Contiguous Zone. 15 U.S.T. 1607, T.I.A.S. 5639 ("Convention"). It is therefore significant that the Government's brief omits any reference to application of the

provisions of Article 7 to the sheltered waters north of Long Island which is the area at issue here. It is also significant that the Government argues that it is unnecessary to consider the bay-like appearance and use of these waters.

The Government essentially seeks to have the Court decide this proceeding by adopting a myopic view of the area involved. This view would take in only that Long Island is an island surrounded on all sides by water, and it would ignore the geographic reality constituted by the waters enclosed by that island.

### **Summary of Argument**

In nature there are bays and there are islands, and one does not preclude the other. Likewise the Convention in Articles 7 and 10 considers the territorial sea as it relates to bays and to islands and these provisions are not mutually exclusive. An analysis of the history and purpose of Article 7 of the Convention and the application of its provisions to Long Island Sound inevitably leads to the conclusion that it is a juridical bay. Moreover, the evidence in the record clearly supports the conclusion of the Master that a juridical bay is present in accordance with this Court's view as expressed in *United States v. Louisiana*, 394 U.S. 11 (1969).

Long Island is a unique island, forming a large enclosed body of water. This body of water complies with the objective criteria for a bay as set forth in Article 7 of the Convention and it fulfills the historic characteristics of a bay under international law. The use of Long Island Sound relates to the mainland, and its waters do not serve as a necessary route for international passage.

Long Island by virtue of its size, its relation to the intervening waters, its proximate positioning to the mainland, its configuration with respect to the mainland, and its ties to the mainland, may realistically be considered a part of the mainland. As the Master found,

If there is ever a situation where a large coastal island will be considered a part of the mainland so the water enclosed between the island and the coast can be a juridical bay, this is it.<sup>1</sup>

## ARGUMENT

### **The Special Master Was Correct in His Conclusion That the Waters of Long Island Sound Are Encompassed Within a Juridical Bay.**

The Government asserts in its brief that the Master's consideration of the "bay-like" appearance and usage of the waters sheltered by Long Island was backward, that his analysis should have started with Long Island as an island and with its relationship to the mainland.<sup>2</sup> This suggested approach is wrong logically, since the presence of an island by itself does not necessarily mean the existence of a bay. The approach is wrong legally since it ignores the criteria of Article 7 of the Convention.

#### **Bay-Like Appearance**

The logical first step in evaluating an area as a possible bay is to look for a geographic bay. Article 7(2) of the

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1. Master's Report at 47.

2. United States' Brief at 8, 21.



Convention provides concise and objective criteria: (1) a well-marked indentation; (2) penetration in such proportion to the width of the mouth to contain landlocked waters and constitute more than a mere curvature of the coast; (3) the area of the indentation must be as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

The Master correctly applied each of the above criteria to the waters north of Long Island and found that the evidence established that the indentation satisfied the criteria. Indeed the Government concedes this, since its only exception is to the relationship of Long Island to the mainland. The Government relies solely upon a geographic view of Long Island, but deliberately chooses to ignore any geographic view of the indentation formed by that island. Since geography is a science which involves the natural features of the earth, there is no basis for such a feigned distinction. Whether one is a mariner or a layman, an examination of a nautical chart showing the waters north of Long Island will show an area having the geographic or natural features of a bay.<sup>3</sup>

### **Bay Use**

The use and purpose of a bay is the basis for the concept in international law that a bay may be closed as internal waters. Article 7 of the Convention is founded upon this concept and it is central to any evaluation of a bay-like area. This concept is that a bay is an area closely related to the

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3. For the convenience of the Court we have attached a portion of the Chart annexed to the Master's Report as Appendix B as our own Appendix A. We have highlighted the water area which New York considers to be a juridical bay.

coastal state and is not an area which is essential to international passage by ships of other states.<sup>4</sup>

The Master found, and the Government conceded, that Long Island Sound is used in accordance with expected use for a bay.<sup>5</sup> The Government, however, asserts that the use as a bay merely stems from the United States' long-standing claim of "historic inland waters."<sup>6</sup> There is *no* support for this assertion in the record; to the contrary, the evidence with respect to shipping, referred to by the Master,<sup>7</sup> obviously relates to the enclosed nature of the waters of Long Island Sound and not to their designation as "historic inland waters."

The New York Court of Appeals, in *Mahler v. Transportation Company*, 35 N.Y. 352 (1866), noted the historic recognition accorded Long Island Sound as internal waters precisely because of the closed nature of its waters:

That Long Island Sound was included within the territorial dominions of the British Empire, at the date of the charter from Charles the Second to the Duke of York, is a proposition too plain for argument. It was an inland arm of the sea, washing no shores but those of the provinces, and with no opening to the ocean, except by passing between British headlands less than five miles apart. The right of the King depended on none of the vexed questions involved in the claims of dominion, by the English over the waters of the Channel, by the Turks over those of the Black Sea, by the Venetians over those of the Adriatic, or the Romans over

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4. See New York's Brief in support of exceptions at 11 n.6.

5. Master's Report at 46; United States' Brief at 22.

6. United States' Brief at 21-22.

7. Master's Report at 46.

those of the Mediterranean. It rested on clear and fundamental principles of international law. The rule is one of universal recognition, that a bay, strait, sound or arm of the sea, lying wholly within the domain of a sovereign, and admitting no ingress from the ocean, except by a channel between contiguous headlands which he can command with his cannon on either side, is the subject of territorial dominion.

*Id.* at 355 (citations omitted).

### **Long Island Viewed as an Extension of the Mainland**

The Master correctly found that under the law and the facts Long Island may be considered as an extension of the mainland. In *United States v. Louisiana*, this Court resoundingly rejected the claim being made here that an island may not form the side of a bay,

No language in Article 7 or elsewhere positively excludes all islands from the meaning of the "natural entrance points" to a bay. Waters within an indentation which are "landlocked" despite the bay's wide entrance surely would not lose that characteristic on account of an additional narrow opening to the sea. That the area of a bay is delimited by the "low-water mark around the shore" does not necessarily mean that the low-water mark must be continuous.

*Id.* at 61.

Here the narrow opening at Throgs Neck is not even into the sea, but into the East River and then into New York Harbor.<sup>8</sup>

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8. The East River is not a true river, but a part of "a very complex estuarine system of the Hudson River". *United States*, witness Dr. Robert L. Swanson, Nov. 11, 1981 at 3-110; *see also* Gottmann, Jan. 11, 1982 at 57; Master's Report at 40 n.30.

This Court went on to say that,

[T]here is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays. But much of the Louisiana coast does not fit the usual mold.

394 U.S. at 61-63 (notes omitted).

Long Island also is a unique island that in size and alignment to the mainland does not fit the usual mold of a coastal island.<sup>9</sup>

The issue which the Government focuses upon in its exceptions and brief arises from the Court's view in *United States v. Louisiana*, that Article 7 requires that in order for

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9. At the hearing the Government introduced numerous charts of the Alaska coast and sought to argue the consistency that had been shown by the Government in drawing the territorial sea around various islands. U.S. Exhibits M.20-28. Aside from the fact that such lines were based upon a self-serving determination that has not been legally challenged, the islands in question were not comparable to Long Island, nor was the other island in the Persian Gulf shown on an additional chart also introduced at the hearing. U.S. Exhibit M.18. Now, apparently recognizing the invalidity of this argument, the Government seeks to rely upon the rejection of claims by Louisiana to mudlumps, to the Isles Deniers, Bonataria Bay, Bob Taylor's Pond, Zingin Bay and Riverside Bay. *United States' Brief* at 12-13, 14 n.7. We would suggest that a comparison of these islands to Long Island is even less relevant than those on the charts in evidence.

an island to form a bay it must be considered a part of the mainland:

We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland.

394 U.S. at 67.<sup>10</sup>

10. Although the evidence of Long Island's relationship to the mainland is overwhelming, we urge the Court to re-examine the basis for the conclusion, that for an island to form a part of an Article 7 bay it must be considered a part of the mainland. We believe that an examination of the history of Article 7 will demonstrate that the correct way of determining the existence of a juridical bay is to consider the use of the waters involved and apply the Article 7 criteria. These criteria are clear, simple and all that are necessary. Such an approach would greatly simplify the job of a Special Master in deciding the issue and would restore the element of "common sense".

In reviewing the history of the Convention, we urge the Court to consider that the term "headland" is not used in the Convention and that "mainland" appears only in Article 11. The drafters of Article 7 obviously knew the meaning of these terms and chose to use "entrance points" connoting greater relationship to the water than to the land, and "coast" a broader term than mainland, and one which would include islands.

An earlier version of Article 7 used the word "inland" in relation to penetration,

For the purpose of these regulations, a bay is a well-marked indentation, whose penetration inland is in such proportion . . .

1 Y.B. Int'l L. Comm. 251, U.N. Doc. A/CN.4/SER.A (1955).

As we know, the final version of Article 7(2) does not include "inland."

The United States' delegation proposed an amendment to what ultimately became Article 3 that used the word "mainland":

Subject to the provisions of the present rules, the baseline is the low-tide line on the mainland. The baseline shall be marked on large-scale charts officially recognized by the coastal State.

U.N. Conf. on Law of the Sea (Official Records) Vol. III, 236 U.N. Doc. A/Conf. 13/39.

The comment with respect to this proposal was,

The word "coast" in the second clause is undesirable since the term was interpreted to include islands and drying rocks and

(footnote continued on next page)

In determining whether or not an island is related to the mainland, this Court suggested consideration of certain factors:

While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its *size*, its *distance from the mainland*, the *depth and utility of the intervening waters*, the *shape of the island*, and its *relationship to the configuration or curvature of the coast* . . . . [T]he task [is one] determining . . . —in the light of these and *any other relevant criteria* and *any evidence* [a *Special Master*] *finds it helpful* to consider—whether the islands which [the coastal state] has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the “coast” within the meaning of the Convention on the Territorial Sea and Contiguous Zone.

*Id.* at 66 (note omitted) (emphasis added).

Evaluating Long Island on the basis of each of these factors, the Master correctly found that it may realistically be considered a part of the mainland. These factors demonstrate that:

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shoals by the International Court of Justice in the Fisheries case [Judgment of 18 December 1951: I.C.J. Reports, 1951, p. 127]. Such a construction would give an unintentionally wide scope to the draft article.

*Id.* at 236 (emphasis added).

In commenting upon the United States proposal, the Yugoslavian delegate stated,

[T]he United States proposal involved a point of substance in so far as it referred to “the low-tide on the mainland”; it made no reference to islands, whereas the International Law Commission’s draft referred to “the coast” thereby covering both mainland and islands.

*Id.* at 140 (emphasis added).



- (1) Long Island by its large size forms a very long and large bay which dwarfs the waters of the East River which separate it from the mainland.
- (2) Long Island is separated from the mainland at Throgs Neck by a distance of approximately  $\frac{1}{2}$  mile.
- (3) The depth of the intervening waters between Long Island and the mainland was increased to 34 feet by the Army Corps of Engineers in the 1800's to permit navigation by large vessels and the waters are utilized for commercial traffic, but not for international passage.<sup>11</sup>
- (4) The shape of Long Island is a long projection of land protruding from the mainland to create an enclosure for the waters to the north.
- (5) Long Island's relationship to the configuration of the mainland on the opposite shore of Long Island Sound is basically parallel, forming an extended indentation.
- (6) The waters of Long Island Sound are protected and isolated from the sea and serve the boating needs of the people in the surrounding areas.
- (7) On a nautical chart or map one may observe the physical connections of Long Island to the mainland and the rest of New York City.<sup>12</sup>
- (8) Finally, the conceded evidence of political, economic and social interconnection between Long Island and the mainland and the rest of New York is overwhelming.<sup>13</sup>

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11. The enormous task undertaken by the Corps is set forth in the *Cradle of the Corps* (U.S. Exhibit 47). This work in the Hell Gate section of the East River increased the depth from 18 to 20 feet to the present 34 feet and reduced the current from 10 to 5 knots, eliminating the extremely treacherous navigation in that area. (*Cradle of the Corps* at 69-75; Neary, Nov. 13, 1981, C-102-03).

12. There are a total of 10 bridges as well as 16 train, utility and water tunnels (New York Exhibit 13).

13. See, e.g., Gottmann, Jan. 11, 1982 at 33-39; United States Exhibit 60 at 13-26.

Common sense dictates what the facts and the law have established, that the waters enclosed by Long Island Sound constitute a bay. We ask only that the Court in reviewing the Master's conclusions give fair and realistic consideration to the facts and to the application of the law. We are confident that an objective and fair determination of this domestic dispute on the merits, unfettered by the Government's irrelevant and invalid protestations of patriotism, lofty doctrines, and suggestion of vague, unsupported international consequences, can only lead to the inevitable conclusion reached by the Master, that Long Island forms a juridical bay.

### Conclusion

For the reasons cited in the Master's Report, in New York's brief in support of its exceptions, and in the brief herein, we respectfully ask the Court to affirm the Master's conclusion that the waters lying to the north of Long Island constitute a juridical bay.

Dated: New York, New York  
June 8, 1984

Respectfully submitted,

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PETER H. SCHIFF  
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## **APPENDIX**

# NEW YORK TO NEW YORK ISLANDS TO FIVE FATHOM BANK

Meridian Projection  
Scale 1:400,000 at Lat. 40°  
North American 1927 Datum

OUNDINGS IN FATHOMS  
AT MEAN LOW WATER

(For offshore navigation only)

## NOTE 8

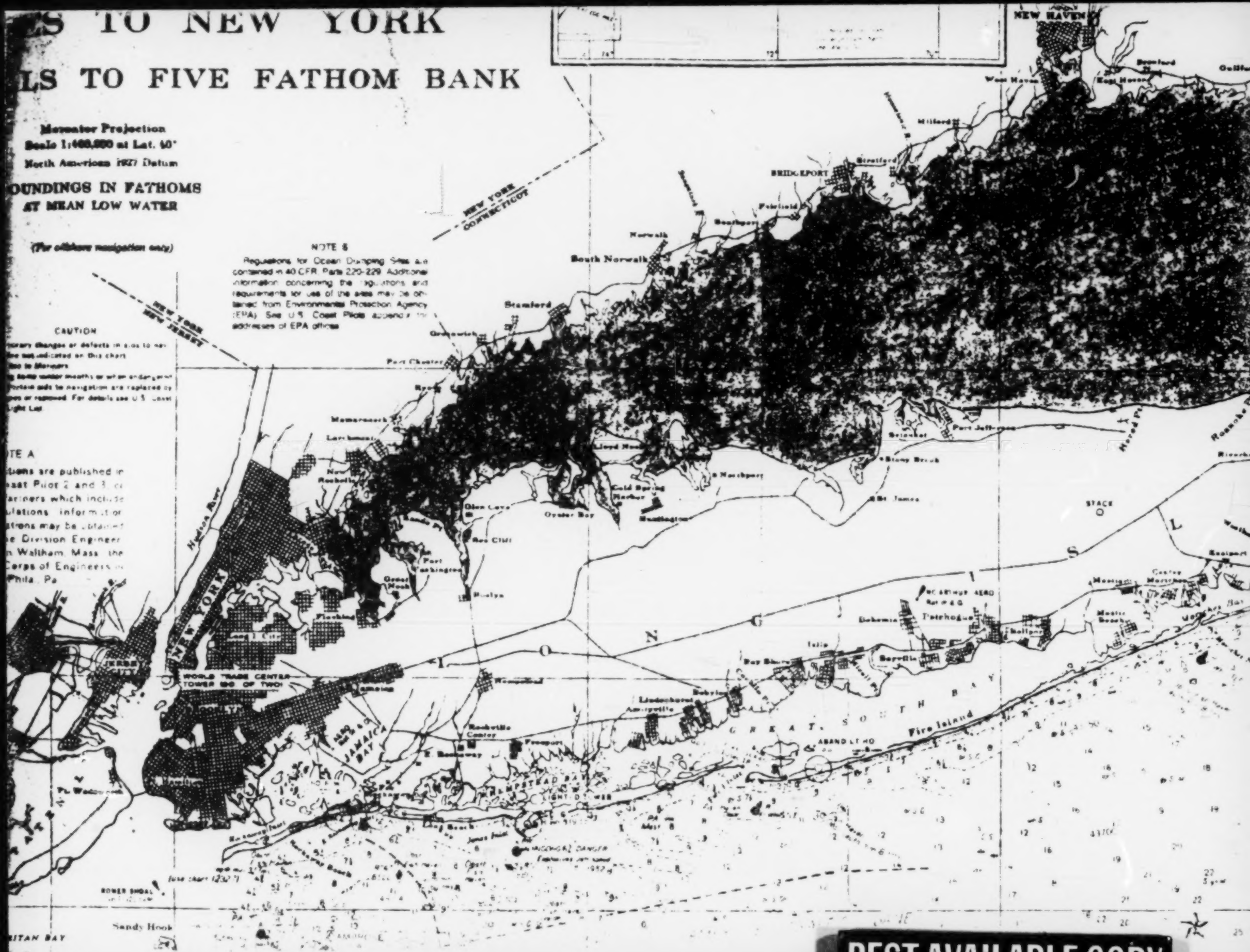
Regulations for Ocean Dumping Sites are contained in 40 CFR Parts 220-229. Additional information concerning the regulations and requirements for use of the sites may be obtained from Environmental Protection Agency (EPA). See U.S. Coast Pilot appendix for addresses of EPA offices.

## CAUTION

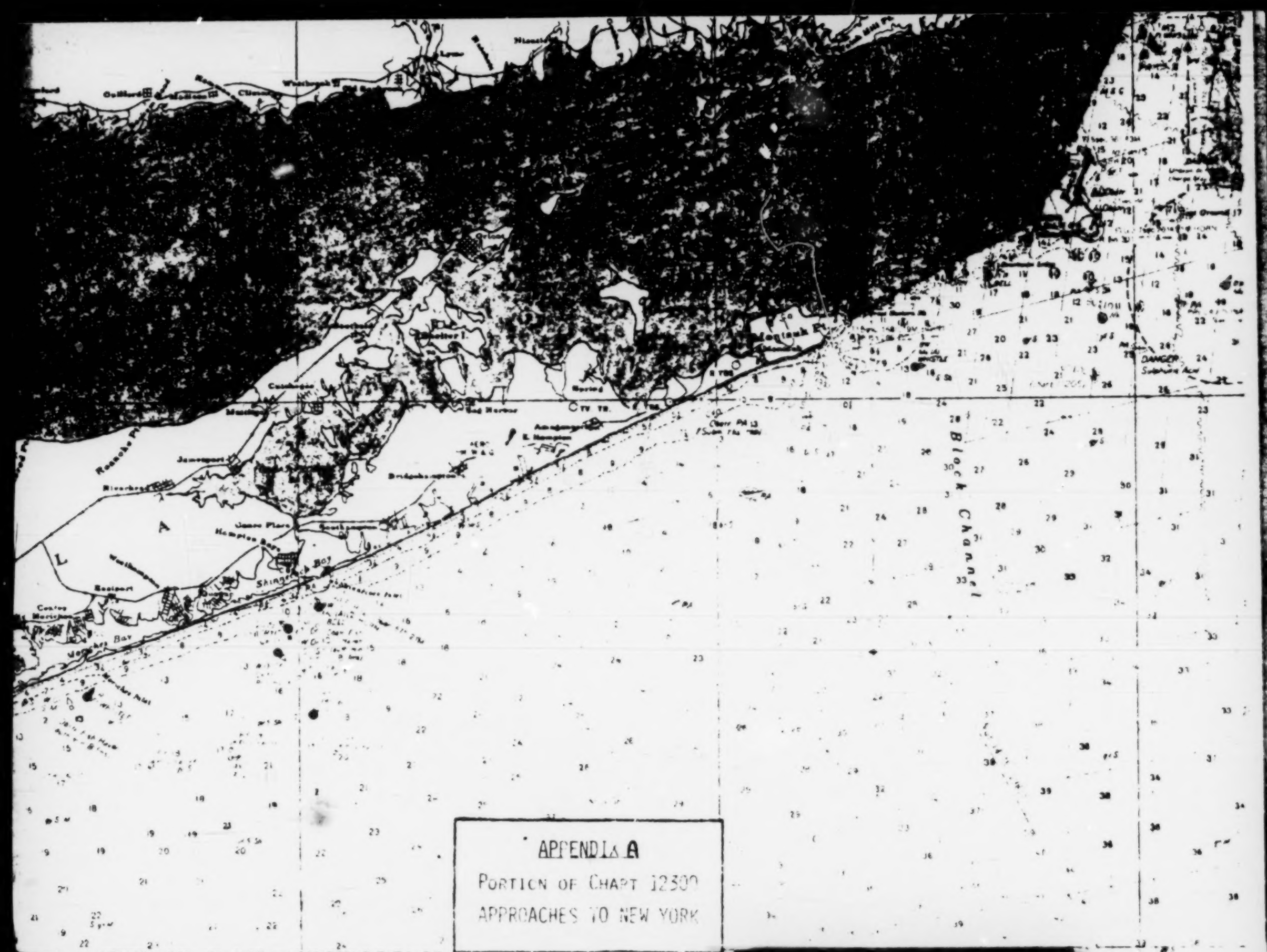
Temporary changes or defects in aids to navigation are indicated on this chart by a red letter 'M' in a circle. If a red letter 'M' in a circle is shown in the vicinity of a light, it indicates that the light is out of service. If a red letter 'M' in a circle is shown in the vicinity of a buoy, it indicates that the buoy is out of service. If a red letter 'M' in a circle is shown in the vicinity of a daymark, it indicates that the daymark is out of service. If a red letter 'M' in a circle is shown in the vicinity of a navigational aid, it indicates that the aid is out of service. For details see U.S. Coast Light List.

## NOTE A

Information is published in Coast Pilot 2 and 3, which includes regulations, information, and instructions may be obtained from the Division of Engineering, U.S. Army Corps of Engineers, Waltham, Mass. or the U.S. Coast Guard, Philadelphia, Pa.



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